

REMARKS

Applicants hereby respond to the Election of Species Requirement by electing the Species of Figs. 1-10, with traverse.

Claims 1-19 are pending. Applicant respectfully submits that claim 1 is generic to claims 2-19. In this regard, Applicants respectfully note that (a) the full text of claim 1 is repeated in claim 20 down to page 20, with claim 2 additionally reciting features in lines 21-29; (b) the full text of claim 1 is repeated in claim 3, down to line 20, with claim 3 additionally reciting features in lines 21-29; (c) claims 4-6 depend from claim 3; (d) claims 7-12, 15, 18 and 19 depend directly or indirectly from claim 1; and (e) claims 13, 14, 16 and 17 depend, directly or indirectly from claim 2.

Applicant respectfully submits that claims 1, 2 and 7-19 read on the elected species; and that claims 3-8 read on the non-elected species.

Applicants respectfully traverse this election of species requirement for the following reasons:

In the first place, a proper restriction requirement, including one "based on species" must demonstrate that the claimed inventions are both independent and distinct. As pointed out in MPEP §808.01, claimed inventions are independent "where they are not connected in design, operation or effect under the disclosure of the particular application under consideration." The Office

Action fails to provide any evidence that the identified species are both independent and distinct.

In the second place, MPEP §803 clearly requires that Examiners must provide reasons and/or examples to support conclusions. In this case, not only is the required evidence, i.e., reasons and/or examples, not provided, but even the assertions needed to properly allege that Applicants are claiming independent and distinct species are not made.

This denies Applicants fundamental procedural and substantive due process, which is required to be accorded patent applicants by the USPTO pursuant to the Administrative Procedures Act. See in this regard, In re Zurko, 119 S.Ct. 1816, 50 USPQ2d 1930 (1999), and In re Gartside, 53 USPQ2d 1769 (Fed. Cir. 2000).

This is a fundamental flaw in the Office Action and, because of it, the election of species requirement must be withdrawn.

In the third place, as pointed out in MPEP §806.04(f), claims to be restricted to different species must be mutually exclusive, i.e., the claims to be restricted to different species must recite the mutually exclusive characteristics of such species, and the species must be patentably distinct from each other. However, the Office Action either alleges this, or sets forth the allegedly mutually exclusive characteristics of such species, let alone makes out a *prima facie* case that claims 1-19 are directed to mutually exclusive species.

Furthermore, because claims 2 and 3, and all dependent claims, include the features of claim 1, all claims recite the characteristics of claim 1 in common, none of which are mutually exclusive characteristics.

Lastly, as pointed out in MPEP §803, regardless of whether or not restriction is proper, there must be a serious burden on the Examiner before restriction should be required. The Office Action does not address the burden placed on the Examiner to examine claims 1-19. Applicants respectfully submit that the Examiner can examine claims 1-19 without undue burden in view of the fact that all of the claims are searchable and classifiable in the same classes and subclasses in the U.S. Patent Classification System.

Conclusion

Applicants have fully complied with the election of species requirement by electing Species I, with traverse, and by indicating which claims read on Elected Species I and which claims read on non-elected Species II. Applicants have also provided detailed reasons in support of their conclusion that the election of species requirement is improper and should be withdrawn, and that claims 1-19 be examined on their merits in the next Office Action.

It is believed that a full and complete response has been made to the outstanding Office Action.

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Response to January 27, 2005 Office Action

If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is invited to telephone Robert J. Webster, Registration No. 46,472, at (703) 205-8000, in the Washington, D.C. area.

Prompt and favorable consideration of this Response to Election of Species Requirement is respectfully requested.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP

By: 

Joseph A. Kolasch
Reg. No.: 22,463

JAC/RJW/adt

P.O. Box 747
Falls Church, Virginia 22040-0747
Telephone: (703)205-8000